IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 10 OF 2004

The National Small Industries
Corporation Limited, a Government
Company registered under the
Companies Act, with its Registered
Address at "Laghu Udyog Bhavan"
Near Okhla Industrial Estate,
New Delhi and Branch Office at
3rd Floor, Om Dutta Sadan,
Opp. Hotel Nova Goa, Panaji, Goa,
through their Senior Branch Manager
Shri M. L. Prakasha. ... Appellant

versus

1. M/s Samudra Corporation,
   a Proprietorship concern
   represented herein by their
   Sole Proprietor Shri Deepak
   L. Kanekar, having his address
   at C/o. Mr. Vithal Naik, House
   No. 20, Ansabhat, Mapusa, Goa.

2. State,
   through the Public Prosecutor,
   Government of Goa, Panaji. ... Respondents

Mr. A. R. Kantak, Advocate for the Appellant.

Mr. A. D. Bhobe, Advocate for Respondent No.1.

Mr. S. N. Sardessai, Public Prosecutor for the State/Respondent No. 2.

CORAM : V. M. KANADE, J.

DATE : 17TH JUNE, 2005.

ORAL JUDGMENT

Heard the learned Counsel appearing on behalf of the Appellant and the learned Counsel appearing on behalf of the Respondents.

2. The Appellant is the Original Complainant who has filed a private complaint against Respondent No.1 in the Court of Judicial Magistrate, First Class 'B' Court, Mapusa, for having committed an offence punishable under Sections 406 and 420 of the Indian Penal Code. In the said complaint, process was issued and charge was framed against the Respondent/Accused. The Accused pleaded not guilty to the said charge. The Complainant examined 2 witnesses in support of his case and also relied on the Inspection Reports dated 4-2-1992 and 8-4-1992. The trial Court, however, acquitted the Accused and dismissed the complaint of the Appellant.

3. The learned Counsel appearing on behalf of the Appellant has submitted that the trial Court has not given cogent reasons for dismissing the complaint of the Appellant. He submitted that reliance is placed on a Judgment of the trial Court which was relied upon by the Accused, ratio of which is not applicable to the present case. He submitted that the trial Court has not properly appreciated the evidence on record and a finding which is recorded by the trial Court is, therefore, perverse. The learned Counsel has taken me to the evidence adduced by the Complainant and also to the two Inspection Reports and submitted that the Complainant had established that the two machines were delivered to the Accused and in the Inspection Reports the Accused had admitted the fact of the installation of the machines and had also stated that they were working satisfactorily. He submitted that in the evidence of P.W.1, D. K. Chaudary and P.W.2, Umesh Butani, it was established that without the consent or permission of the Complainant the machines were disposed of by the Accused and there was, therefore, a clear case of criminal breach of trust made out against the Accused. He submitted that further from the evidence which was adduced by the Complainant it was clearly established that the Accused had dishonestly induced the

Complainant to deliver the machines and the Accused from the inception had an intention of cheating the Complainant. In support of the said submission, the learned Counsel on behalf of the Appellant relied on the Judgments of the Supreme Court in the cases of **Trisuns Chemical Industry** v. **Rajesh Agarwal and others** reported in ((1999) 8 SCC 686), **Rajesh Bajaj** v. **State NCT of Delhi and others** reported in ((1999) 3 SCC 259) and also on the case of **Alphic Finance Ltd.** v. **P. Sadasivan and another** reported in (2001) 3 SCC page 503. The learned Counsel submitted that the trial Court had clearly erred in coming to the conclusion that the Complainant had a civil remedy against the Accused and the dispute in question was a civil dispute. He, therefore, submitted that the Judgment and Order of the trial Court is liable to be set aside and the Respondent/Accused is liable to be convicted.

4. The learned Counsel appearing on behalf of the Respondent has opposed the said submissions made on behalf of the Appellant. He submitted that the trial Court had given clear and cogent reasons while coming to the conclusion that the Complainant had not established his case. He submitted that the trial Court had correctly assessed the evidence and had come to

the conclusion that the dispute was of a civil nature and, therefore, criminal case was liable to be dismissed. He submitted that this Court cannot interfere with the Order passed by the Judicial Magistrate, First Class, Mapusa.

5. The Complainant in his complaint has stated that the Complainant is a Government Company having branches all over India and that the Complainant had entered into the Hire-Purchase Agreement dated 30-9-1991 with the Accused and the Complainant had arranged for the supply of two machines to the Accused. In the complaint, it was further stated that according to the Hire-Purchase Agreement an additional amount of Rs.12,381/- was paid by the Accused and the balance amount was to be paid in equal instalments. In the complaint, it was further stated that in the event of any default in the payment of instalments it was agreed in the Hire-Purchase Agreement that the Accused would hand over the possession of the machines. It was further stated that the machines were not handed over by the Accused though a legal notice was served and subsequently when the Officers of the Complainant/Corporation had visited the site where the machines were installed they found that the machines were not available at the site. Thereafter, though,

several notices were issued to the Accused neither the balance instalments were paid nor the machines were returned to the Complainant. It was alleged, therefore, that the Accused had committed an offence punishable under Sections 406 and 420 of the Indian Penal Code. In support of the said complaint, the Complainant examined two witnesses, namely, P.W.1, D. K. Chaudary and P.W.2, Umesh Butani. This evidence was adduced after the charge was framed by the trial Court. The Complainant had brought the Memorandum of Agreement and other correspondence on record before the framing of the charge and thereafter had produced on record through P.W.2, Umesh Butani, the two Inspection Reports dated 4-2-1992 and 8-4-1992. The Complainant also produced on record the Invoice dated 6-12-1991 on which there is an endorsement that the mechanic had installed the machinery and that the Accused was fully satisfied with the work done.

6. From this evidence, in my view, it has been established that the Complainant had entered into a Hire-Purchase Agreement with the Accused and the machinery was installed at the Office of the Accused. However, from this evidence, in my view, it is difficult to come to the conclusion

that the machines in question were disposed of by the Accused. P.W.1, D. K. Chaudary, in his evidence has stated that after the Accused failed to pay the instalments a repossession notice was served on him and the repossession of the machines were demanded and that on 6-3-1995 he along with other two employees had gone to the address of the Accused where the machines were kept. However, the machines were not found at the premises. He has further stated that he had gone to the house of the Accused and met his mother and informed her the reason of their visit and requested her to inform the Accused that they would be visiting the premises on 16-3-1995. He has further stated that he visited the premises on 16-3-1995 and 26-5-1995 and on both occasions they found that the premises were closed. Again, they visited the premises in August, 1995 and on that day also the premises were found closed. He had further stated that the Accused did not permit the Officers of the Complainant to inspect the machines and thereafter a legal notie dated 5-5-1995 was sent to the Accused. From this evidence, it can be seen that on the subsequent occasions when the Complainant had visited the premises the premises were found to be closed and the Accused did not permit P.W.1, D. K. Chaudary to inspect the machines. Thus, it cannot be said from

this evidence that the Accused had disposed of the machines. A bare statement is made that on 6-3-1995 when they visited the premises machines were not found at the place. In the entire evidence this witness has not stated the place where the machines were installed in the premises which were visited by him and the other Officers. Thus, in my view, this witness does not establish that the Accused had disposed of the machines. P.W.2, Umesh Butani, also has reiterated whatever had been stated by P.W.1, D. K. Chaudary. This witness was re-examined after his cross-examination was over and the Inspection Report was brought on record. However, the Inspection Report is a proof of the fact that the machines were installed in the Office of the Accused. It does not establish the fact that the Accused had disposed of the machines. Thus, in my view, the Complainant has not established that the Accused had sold the machines without their consent and had committed an offence of criminal breach of trust.

7. In my view, the Complainant also has not established that the Accused from the inception had an intention to adduce the Complainant to deliver the property and from the inception intended to cheat the Accused. The Complainant has relied on the fact that apart from paying the marginal money no instalment was paid by the Accused and from this an inference could be drawn about the intention of the Accused. Reliance was placed on

Illustration f to Section 415 and was submitted that this case was squarely covered under the said illustration. It is not possible to accept the submission of the learned Counsel appearing on behalf of the Appellant. In my view, there is no evidence on record from which an inference could be drawn that the Accused from the inception had intended to cheat the Complainant. In a case where there is a breach of an agreement executed between the parties merely because there is a breach and several amounts which are due and payable by one party to the other are not paid it cannot be said that the offence punishable under Section 420 or that the offence of criminal breach of trust is committed by the Accused. There are catenas of Judgments of the Supreme Court and this Court wherein it has been observed that in order to attract the provisions of Section 406 or Section 420 of the Indian Penal Code the ingredients of the said offence have to be established. It is no doubt true that in a given case of a breach of contract a prosecution could be launched under the provisions of Section 406 or Section 420 and at the same time simultaneously a civil suit could also be filed. However, this is not always true and in order to establish that the breach of contract had resulted into an offence punishable under Sections 406 or 420 of the Indian Penal Code there should be sufficient material on record on the basis of which such inference can be drawn. In my view, from the evidence on record, it is not possible to draw such an inference.

8. The learned Counsel has relied on the Judgments which are referred to hereinabove. In my view, the ratio of the said Judgments will not be applicable to the facts of the present case. In all the three cases on which reliance is placed by the learned Counsel appearing on behalf of the Appellant, the question before the Supreme Court was whether the High Court was justified in exercising its jurisdiction under Section 482 of the Code of Criminal Procedure for the purpose of quashing complaints which are filed under Sections 406 and 420 of the Indian Penal Code and in the said context had discussed to the averments made in the complaint and had held that the complaint was not liable to be quashed. However, in the present case evidence already has been brought on reord by the Complainant and from this evidence, in my view, it is not established that the Accused had committed an offence under Sections 406 or 420 of the Indian Penal Code.

9. It is no doubt true that the trial Court ought to have appreciated the evidence on record before coming to the conclusion that the dispute between the parties was civil in nature. The trial Court without appreciating the evidence on record has recorded the findings. However, in view of the findings recorded by me, I do not see any reason to set aside the

order of acquittal passed by the trial Court. The Criminal Appeal is, therefore, dismissed.

V. M. KANADE, J.

RD.